

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: SPRINT COMMUNICATIONS COMPANY L.P., LEVEL 3 COMMUNICATIONS, LLC, AND KMC TELECOM V, INC.	DOCKET NO. DRU-03-5 (SPU-02-11 SPU-02-13)
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ORDER DENYING REQUEST FOR DECLARATORY RULING

(Issued October 6, 2003)

Petitioners' Request For Declaratory Order

On September 16, 2003, Level 3 Communications, LLC, Sprint Communications Company L.P., and KMC Telecom V, Inc., (collectively, Petitioners) filed with the Utilities Board (Board) a "Request For Expedited Declaratory Ruling." Petitioners seek a ruling to the effect that when the Board issued its June 6, 2003, "Final Decision And Order" in Docket Nos. SPU-02-11 and SPU-02-13 (the "Final Decision And Order") and encouraged the parties to negotiate and seek alternative solutions, the Board contemplated that the parties would consider alternatives other than the retail services already available through the tariffs and catalogs of the incumbent local exchange carriers (ILECs).

Petitioners state that in the first round of negotiations, the ILECs, specifically Qwest Corporation and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, did not offer any alternatives other than their existing retail products and services, which were available to Petitioners even before they initiated these dockets.

Petitioners argue that the Board must have intended that the parties negotiate regarding alternatives that are not already available, since an interpretation that allows the ILECs to offer only solutions that are readily available without negotiations renders the concept of "negotiation" meaningless.

The specific question presented by the Petitioners is as follows:

Did the Board's Order contemplate or require the ILECs to present or consider alternatives in the "managed negotiations" beyond the retail services already available through the ILEC's tariffs or catalogs at the time of the hearing?

(Request For Expedited Declaratory Ruling at unnumbered page 2.)

Petitioners filed their request pursuant to the procedures established in the "Final Decision And Order," in which the Board created a mechanism for the Board's administrative law judge to issue quick, non-binding advisory resolutions of impasse issues, which can then be appealed to the Board for an expedited decision in the nature of a declaratory order. Petitioners ask that the Board skip the advisory resolution and directly grant a declaratory order prior to the parties next negotiating session, tentatively scheduled for the week of October 6, 2003.

On September 19, 2003, the Board issued an order tentatively granting Petitioners' procedural request to skip the advisory resolution step of the dispute resolution process the Board established in the "Final Decision And Order" and shortening the time for filing responses to the request for declaratory order to September 24, 2003.

Pursuant to that order, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), and Qwest Corporation filed timely responses to the Petitioners' request for declaratory order.

Iowa Telecom's Response

Iowa Telecom expresses its disagreement with the manner in which the Petitioners have characterized Iowa Telecom's participation in the negotiations, asserting that Iowa Telecom did not limit its presentation or alternatives to retail services. Iowa Telecom quotes from the September 4, 2003, report filed in Docket Nos. SPU-02-11 and SPU-02-13, saying that Iowa Telecom proposed an alternative and expressed its willingness to negotiate regarding wholesale services.

Iowa Telecom notes that the Petitioners have sought judicial review of the Board's decision in the SPU dockets in the Polk County District Court and, in their appeal, the Petitioners have claimed the Board lacks jurisdiction to order the parties to commence negotiations to develop an alternative form of service. Iowa Telecom states that it does not have any objection to the Board providing a forum for discussion of the issues, but Iowa Telecom would agree with the Petitioners that the Board lacks jurisdiction to instruct the parties on the positions they must take.

Iowa Telecom notes that the Board's orders in the SPU dockets have not mandated or directed a position that any party should take; accordingly, there is nothing to preclude a party from articulating a position that there are no acceptable alternatives other than the retail services already available. Iowa Telecom

emphasizes that it has not taken such a position, but instead has offered the other parties wholesale alternatives that are not currently available.

Qwest's Response

Qwest's response begins with an assertion that the Petitioners' appeal of the Board's SPU orders removed jurisdiction of this matter from the Board. Qwest argues that a lower forum loses jurisdiction of a matter when an appeal is filed, unless the appeal is dismissed, the appellate forum orders a limited remand, or the matter is collateral to the subject matter on appeal. Qwest argues that none of these exceptions apply here.

Next, Qwest complains that the Board's first order in this docket, shortening the time for response to the request for declaratory order, was mailed to Qwest and did not arrive until September 22, 2003, allowing Qwest only two business days to prepare its response.

Qwest argues that the request for declaratory order should be denied because it seeks improper relief. First, Qwest asserts its negotiations have been in good faith, describing the efforts it has made in that regard. Second, Qwest argues that the Petitioners' request is, in effect, a request that the Board order Qwest to accept the Petitioners' proposals. Qwest asserts that the Board should not use this declaratory order process to order any party to adjust its negotiating position.

Finally, Qwest argues the Board does not have jurisdiction to grant the relief requested by the Petitioners because Qwest is not required to offer services that are

not in its tariff and no party has filed any complaint that would give the Board jurisdiction to consider the services in Qwest's tariff.

Analysis

First, the Board finds that it has jurisdiction of the Petitioners' request for declaratory order. When an appeal is taken from a district court decision, the district court still has jurisdiction of collateral matters, including enforcement of its (unstayed) decision; this exception serves to expedite the resolution of disputes. Shedlock v. Iowa District Court for Polk County, 534 N.W.2d 656, 658-59 (Iowa 1995). The Board believes a similar analysis applies to this administrative law matter. This matter is therefore collateral to the issues that are the subject of judicial review in the Polk County District Court because it is related to enforcement of the Board's "Final Decision And Order" and today's order may expedite the ultimate resolution of this dispute. Moreover, the Board always contemplated that it would entertain and issue declaratory orders regarding these negotiations, even if an appeal was filed. As the Board recognized in its "Final Decision And Order" in the SPU dockets, there was a reasonable likelihood that one or more of the parties to those dockets would appeal the Board's decision (although the Board believes that appeal should be to the FCC, rather than to the District Court), and the Board nonetheless encouraged the parties to commence negotiations with the option of obtaining advisory rulings and declaratory orders regarding specific issues. See "Final Decision And Order" at page 26.

Second, the Board rejects Qwest's allegation that it had insufficient time to prepare its response to the request for declaratory order. The Board said in the "Final Decision And Order" that this would be an expedited process. If Qwest received the Petitioners' request for declaratory order when it was served on September 16, 2003, but chose not to start preparing its response until it received the Board's order of September 19, 2003, that was Qwest's choice. Moreover, the Board is aware that counsel for the Board contacted counsel for each of the parties by telephone when the order shortening time to respond was issued on September 19, 2003, so Qwest was aware of the order as soon as it was issued and could have obtained a copy on the Board's Web site. The Board gave Qwest all the notice, and all the time, it could, given that negotiations are scheduled to resume the week of October 6, 2003.

Finally, the Board will address the merits of the Petitioners' request. The Petitioners' specific question is:

Did the Board's Order contemplate or require the ILECs to present or consider alternatives in the "managed negotiations" beyond the retail services already available through the ILEC's tariffs or catalogs at the time of the hearing?

The answer to this question is that the Board contemplated, but did not order, that the parties would consider and discuss alternatives beyond the available retail services, if such alternatives exist. The Board also recognized that such alternatives may not exist, at least in the good-faith opinion of one or more of the parties.

In essence, the Petitioners ask the Board to determine how Qwest and Iowa Telecom should participate in these negotiations in order to be considered in good faith, and specifically to declare that Qwest and Iowa Telecom must develop and propose new service alternatives for the Petitioners' consideration. The Board will deny that request, as it cannot appropriately dictate the negotiating positions of the parties.

Further discussion of the Board's intent when it issued the "Final Decision And Order" may be helpful to the parties. The Board directed the parties to "commence" negotiations; nothing more. The Board envisioned discussions concerning all likely alternatives for providing the telecommunications services that may be required or useful to support competitive Internet access service. This could include tariffed retail services, wholesale services, and, possibly, other services that do not even exist at present. But the plain fact is that these are negotiations, defined in Black's Law Dictionary as a "process of submission and consideration of offers until acceptable offer is made and accepted."¹ As the Board recognized in the "Final Decision And Order," it is possible that these negotiations will fail, that is, that there is no acceptable offer that can be made and accepted. The Board cannot order that the negotiations must be successful; it could only order that they start.

If the negotiations fail, at the end of the nine-month period or at an earlier time, the Board will consider other options for resolving these issues, which might include

¹ Black's Law Dictionary, 5th Ed., page 934 (1979).

consideration of modifications to Qwest's and Iowa Telecom's tariffed services; arbitration pursuant to 47 U.S.C. § 252; complaint proceedings; or, other alternatives, assuming in each case that the necessary jurisdictional prerequisites are satisfied. The Board will also consider at that time whether to direct NANPA to reclaim telephone numbering resources that are currently being used to provide VNXX services or allow those services to continue while other alternatives are sought.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Request For Expedited Declaratory Ruling" filed by Level 3 Communications, LLC, Sprint Communications Company L.P., and KMC Telecom V, Inc., on September 16, 2003, is denied, as described in the body of this order.

UTILITIES BOARD

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Mark O. Lambert

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 6th day of October, 2003.